



December 19, 2000

Mr. Robert Martinez
Staff Attorney
Texas Natural Resource Conservation Commission
P. O. Box 13087
Austin, Texas 78711-3087

OR2000-4756

Dear Mr. Martinez:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 142402.

The Texas Natural Resource Conservation Commission (the "commission") received two requests for information relating to the development of the Total Maximum Daily Loads ("TMDLs") for phosphorous in the North Bosque River. You inform us that the commission has made a portion of the responsive information available to both requestors. You claim that the rest of the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the representative sample of information you submitted.¹ We also received and have considered the comments that one of the requestors submitted to this office.

Section 552.111 of the Government Code excepts from required public disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of section 552.111 is to protect advice, opinion, and recommendation used in the decisional process from public disclosure and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App. -- San Antonio 1982, no writ); Open Records Decision No. 559 (1990). In Open Records Decision No. 615, this office reexamined the

¹This letter ruling assumes that the representative sample of information that you submitted is truly representative of the requested information as a whole. This ruling neither addresses nor authorizes the commission to withhold any responsive information that is substantially different from the submitted information. *See Gov't Code* § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App. – Austin 1992, no writ). We concluded that section 552.111 excepts from required public disclosure “only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body[.]” Open Records Decision No. 615 at 5-6. This exception also encompasses communications between governmental entities that share a privity of interest or common deliberative process. Section 552.111 generally does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. However, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation that severance is impractical, factual matter also may be withheld. Open Records Decision No. 313 (1982).

In this instance, you describe the submitted documents as draft versions of proposed TMDLs for phosphorous in the North Bosque River. You state that the TMDLs are required by federal law and that their promulgation is within the jurisdiction of the commission as the lead state environmental agency with jurisdiction over water quality. You indicate that the commission was responsible for the preparation of the draft TMDLs. You inform us that the final versions of the TMDLs have been released for public review and comment. The commission seeks to withhold the drafts of the TMDLs under section 552.111. In Open Records Decision No. 559 (1990), this office concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the advice, opinion, and recommendation of the drafter with regard to the form and content of the final document, so as to be excepted from public disclosure under the statutory predecessor to section 552.111. The exception encompasses factual information in the draft that also will be included in the final version of the document. *Id.* Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *Id.* Based on your representation that the documents in question are the commission’s preliminary drafts of documents that were released to the public in their final form, and having reviewed the submitted documents, we conclude that the information in question is excepted from disclosure under section 552.111. As we are able to make this determination, we need not consider your claim under section 552.107.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

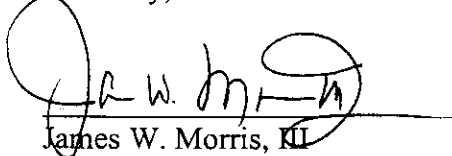
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris", is written over a horizontal line.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 142402

Encl: Submitted documents

cc: Ms. Susan Potts
Potts & Reilly, L.L.P.
401 West 15th Street, Suite 850
Austin, Texas 78701-1665
(w/o enclosures)

Mr. Jack Battle
Brown McCarroll & Oaks Hartline L.L.P.
111 Congress Avenue, Suite 1400
Austin, Texas 78701-4043
(w/o enclosures)